IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

No. 78-1681

* * *

STATE OF TEXAS,

Petitioner

V.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

* * *

PETITION OF THE STATE OF TEXAS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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* * *

The Petitioner, State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 11, 1979.

OPINIONS BELOW

The decision of the Court of Appeals is reported in *Public Service Company of North Carolina, Inc., State of Texas, State of Louisiana, Petitioners, v. Federal Energy Regulatory Commission, Respondent,* at 587 F.2d 716 (1979) and is appended hereto as Appendix B. The order denying rehearing is included as Appendix A.

The following orders of the Federal Power Commission, in Docket No. RP 76-103, are also appended:

Order Setting Question for Briefs and Providing for Additional Notice Period, issued October 5, 1976. (Appendix E).

Declaratory Order on Jurisdiction over State Activities and on Necessity for Abandonment Authorization and Denying Oral Argument, issued April 26, 1977. (Appendix D).

Order Denying Rehearing, issued July 6, 1977. (Appendix C).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 11, 1979. (Appendix B). A timely petition for rehearing was denied on February 8, 1979 (Appendix A), and this petition of certiorari was filed within ninety (90) days of that date. This court's jurisdiction in invoked under 28 U.S.C. §1254(1).

State of Alaska, State of New Mexico Energy Resources Board, Public Service Commission of the State of New York and Natural Gas Pipeline Company of America were Intervenors in the proceeding below.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state of the union which is not a "natural gas company" under the Natural Gas Act of 1938 (the Act) may nevertheless be made subject to the abandonment provisions of Section 7(b) of the Act.

2. If so, may a state be made subject to said provisions by reason of having acquiesced to the certificated sale of its royalty gas in interstate commerce?

3. If so, under the circumstances of this case, did the conduct of the State of Texas (Texas) constitute acquiescence?

4. Whether the subjection of Texas to the Act in respect of its royalty gas would constitute an unconstitutional intrusion on state sovereignty.

STATUTORY PROVISIONS INVOLVED

Sections 2 and 7 of the Natural Gas Act of 1938, 15 U.S.C. §§717(b), 717f(b), set out in Appendix F; Tenth Amendment to the United States Constitution, provides:

> "The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

On June 1, 1965, Texas issued to Superior Oil Company (Superior) State Leases Nos. M-58093 and M-58094, covering State land in the Gulf of Mexico, Block No. 14-L, High Island Field, Jefferson County, Texas. In 1971, gas production was obtained from these leases which was sold by Superior to Natural Gas Pipe Line of America (Natural) pursuant to a certificate of public convenience and necessity dated November 8, 1971, issued by the Commission to Superior under Section 7(c) of the Act.

Texas received its royalty from such production in cash until April 25, 1975, when it notified Superior, Natural and the Commission that it desired to exercise its option to take its gas royalty in kind[1] for sale to Public

[1]In proceedings before the Commission, there was a dispute as to when Texas' right to take in-kind arose: when the leases were executed, or by a subsequent pooling agreement. The Commission

(continued on page 4)

Service Company of North Carolina, Inc. (Public Service).

The Secretary of the Commission, by letter of June 13, 1975, notified Texas and Public Service that the royalty gas could not be "diverted from interstate commerce" without abandonment authorization under Section 7(b) of the Act.

Public Service, on May 24, 1976, petitioned the Commission for a declaratory order[2] determining that since Texas was not a "natural gas company" and the abandonment requirement of Section 7(b) of the Act, in terms, applies only to natural gas companies,[3] no abandonment procedures would be necessary.

The Commission, commenting this was "a case of first impression. . .setting out a fundamental question of jurisdiction," by order of October 5, 1976 (Appendix E, p. 38a), required the parties to submit briefs on the following issues:

Footnote 1 continued - claimed there was no such specific provision in the leases, and Texas said it was implicit in the leases because it was in the statutes authorizing the issuance of state mineral leases, and moreover, that the statutes were expressly incorporated into the leases by reference. The Court below dismissed the question as "irrelevant" (Appendix B, p. 9a) because, even if Texas' rights arose ab initio, it acquiesced in the dedication. So, the question of when Texas' right to take in-kind arose has gone out of the case.

[2]Texas, Louisiana, New Mexico and Alaska intervened on the side of Public Service, and Public Service Commission of New York, American Public Gas Association and Natural, against.

[3]Section 7(b) provides, in relevant part, that "*No natural gas company* shall abandon all or any part of its facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities, without permission and approval of the Commission first had and obtained. (Emphasis supplied).

(1) Within the meaning of Section 2 of the Natural Gas Act, is there any legally applicable difference between a State of the United States and an agency of a State?

(2) Is a State of the United States subject to the jurisdiction of the Commission under the Natural Gas Act?

(3) If a State is a jurisdictional entity, does that automatically make any agency of the State jurisdictional, or is it a separate question then whether the agency is jurisdictional?

(4) If a State is not jurisdictional, can an agency of the State be jurisdictional?

(5) If the Commission has no jurisdiction over a State or an agency of the State, can the Commission then require the present producer of the States' or state agency's royalty share to obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act prior to the State or its agency selling the subject gas in interstate commerce?

By Declaratory Order issued April 26, 1977 (Appendix D, p. 26a), the Commission concluded Questions 1 through 4 should be answered in the negative, but, nevertheless, held as to Question 5 that *both* Texas and Superior must obtain abandonment authority. An Order Denying Rehearing, issued July 6, 1977 (Appendix C), narrowed the holding somewhat, prompting the Commission, in its Brief before the Court of Appeals, to state:

> "We emphasize that the Commission's orders herein relate only to the leases acquired by Superior in 1971, certificated in that same year

and then later amended to permit Texas the option to take its royalty interest in-kind. *The Commission premised its decision on the fact that Texas did not acquire the rights to take its royalty in-kind until considerably after the dedication to interstate commerce* (R. 285). Because the Commission correctly held that Texas' royalty option did not arise until after the dedication, *the Commission did not reach the further question whether the result would be the same if Texas had possessed the option from the outset. This question is thus not presented here.*" (Emphasis supplied).

Nevertheless, the Court of Appeals for the Fifth Circuit decided such question in the affirmative. On Appeal to said court by Texas, Public Service and Louisiana, under 15 U.S.C. §717r and Rule 15, Federal Rules of Appellate Procedure, the Court held that even had Texas possessed the option from the outset, its behavior in accepting cash royalties constituted acquiescence and subjected Texas to the abandonment provisions of the Act contained in Section 7(b).[4] The Court relied very heavily on *California v. Southland Royalty Co.*, 436 U.S. 519 (1978), stating:

> "As we see it, *Southland* establishes the principle that any party, whether a 'natural gas company' or not, that acquiesces in the 'dedication' of its gas to interstate commerce becomes obligated to continue dedicated service or seek Commission approval to abandon it."

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[4]The Court on December 8, 1978, requested memoranda from Counsel regarding the effects, if any, of the Natural Gas Policy Act of 1978 (NGPA), Pub.L. 95-621, 92 Stat. 3340, which was passed subsequent to oral argument of the instant case and before the court's judgment. All parties agreed that the NGPA had no significant impact on this case.

Texas applied for rehearing, pointing out that not only was there no showing of when its agents and agencies became aware of the certification of the Superior sale of state gas, but that the state of the law in 1971 when the alleged "acquiescence" began was such that Texas could not have reasonably been expected to anticipate its actions (or inaction) could constitute acquiesence. Rehearing was denied by order dated February 8, 1979.

REASONS FOR GRANTING THE WRIT

A. THE UNPRECEDENTED EXTENSION OF COMMISSION JURISDICTION OVER STATES AND STATE AGENCIES IGNORES THE INTENDMENTS OF CONGRESS EXPLICIT IN THE NATURAL GAS ACT.

Both the Fifth Circuit[5] and the Commission[6] appear to recognize that the language of the Act excludes states and state agencies. Indeed, not only the plain language excluding states from the ambit of the Act (Section 2 of the Natural Gas Act, Appendix F, p. 41a), but the legislative history and the case law all support the proposition that Congress had no intention of subjecting the states of the union and their political subdivisions to regulation under the Act.

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[5]The Court of Appeals vouchsafes that Texas' position is logical and consistent with the statutory language (Appendix B, p. 7a).

[6]The Commission's Declaratory Order of April 26, 1978, (Appendix D, p. 31a) states:

> "(1) Neither a state of the United States nor any state agency are natural gas companies subject to the jurisdiction of the Commission within the meaning of the Natural Gas Act."

As stated in *Southland* and in many other cases, the fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices. *Sunray Mid-Continent Oil Co. v. F.P.C.*, 364 U.S. 137 (1960). Congress designed the Act to accomplish this by regulating rates and service of interstate pipeline companies to local gas distributor gas utilities. *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 609-11 (1944). In so doing, Congress refrained from exercising its full power under the commerce clause. *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). Among other things, such as intrastate sales, that were excluded from the ambit of the Act, were states and their political subdivisions. As stated by this court in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507 (1947):

> "The Act, though extending federal regulation, had no purpose or effect to cut down state power. . . *The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.*" 332 U.S. at 517-518. (Emphasis supplied).

This policy made perfect sense not only in the context of the constitutional limitations on the exercise of federal control over state activity, but also in relation to the purpose stated above, to protect consumers from monopoly pricing of interstate pipelines. Congress was not interested in regulating states and state agencies whose functions are governmental and which are by definition not profit-oriented entities. Certainly, it was not attempting to regulate states in respect of the disposition of gas from their very own public lands. This policy was reaffirmed recently in Section 13(b) of the Alaska Natural Gas Transportation Act of 1976, P.L. 94-586, 15 U.S.C. 719 et seq. 719k, which recognized the right of the State of Alaska to withdraw its royalty gas at any time for interstate commerce for use within Alaska.

Moreover, if the jurisdiction of the Commission to regulate Texas in requiring it to seek abandonment under Section 7(b) is upheld, presumably, the state could be subject to the other regulatory sections of the Act. These are not only numerous but call for many elaborate accounting, reporting, auditing and other operating practices which would be administratively unfeasible both for the states and the Commission.

No intent to apply such a regulatory maze to states should be imputed to Congress in the absence of a clear expression of such intent, and the language of the Act specifically negates it.

B. THE PROCRUSTEAN APPLICATION OF *SOUTHLAND* BY THE FIFTH CIRCUIT CALLS FOR ELUCIDATION OF THE CASE BY THIS COURT.

While apparently agreeing with Petitioners as to the literal meaning of the Act, the Fifth Circuit felt compelled in this case to extend jurisdiction to states and state agencies by reason of the decision in *Southland*. The Court below states:

> "As logical and as consistent with the statutory language as petitioners' argument might appear, we must nevertheless conclude that their position cannot be upheld. Our reading of the recent Supreme Court decision in California v. Southland Royalty Company, 1978, 436 U.S. 519, 98 S.Ct. 1955, 56 L.Ed2d 505, leads us to conclude that an entity's status as a 'natural gas company' is largely irrelevant to the question of whether that entity must seek abandonment authorization under §7(b). As we see it, Southland establishes the principle that any party, whether a 'natural gas company' or not, that acquiesces in the 'dedication' of its gas to interstate commerce becomes obligated to continue the dedicated service or seek

Commission approval to abandon it. 587 F.2d 716, 719 (App. B, p. 7a)."

Petitioner believes that the Fifth Circuit's conclusions are not called for by *Southland* and urges the Court to grant a writ if we are correct in this.

To begin with, *Southland* did not involve a state of the union, but private corporate landowners. Since states and state agencies are in terms removed from the regulatory reach of the Act, unlike the Respondents in *Southland*, such could have afforded some grounds upon which the Fifth Circuit could distinguish the cases. Also, the holding by the Commission itself in *Panhandle Eastern Pipe Line Co. v. City of Rolla, Kansas*, 26 F.P.C. 736 (1961) that political subdivisions of the states are not subject to the Act even when engaged in the sale of natural gas to interstate pipeline companies, indicates the exceptional nature of states and state agencies vis-a-vis Commission regulation under the Act.

But the Fifth Circuit concluded that "Southland establishes the principle that any party, whether a 'natural gas company' or not, that acquiesces in the 'dedication' of its gas to interstate commerce, becomes obligated to continue the service or seek Commission approval to abandon it."

Applying this principle, the Court of Appeals held that Texas had acquiesced in Superior's sale of state gas in interstate commerce and "having consented to Superior's interstate sales of gas, cannot now object to the rules and restrictions that accompany such sales."

It is Texas' position that *Southland* established no such principle and that even if it had Texas cannot reasonably be held to have acquiesced.

(1) *Southland does not hold that the jurisdiction of the Commission can be extended to States by acquiescence.*

The principle said by the Fifth Circuit to have been established by *Southland* in respect of acquiescence, escapes Petitioner.[7] Under a fair reading of the entire opinion, the ratio decidendi of *Southland* did not hang on the acquiescence of the reversionary owners. It is true that at one point the Court states,

> "Having authorized Gulf to make interstate sales of gas, respondents could not have expected those sales to be free from the rules and restrictions that from time to time would cover the interstate market."

But this vague statement is a far cry from finding acquiescence as the basis for decision. It seems fair to say that even had there been no acquiescence, the decision, which was primarily based on *Sunray Mid-Continent Oil Co. v. F.P.C.*, 364 U.S. 317 (1960), would have been the same.

Taken in context of the entire opinion, the above statement seems to have been, at most, a mere make-weight argument to mitigate somewhat the seeming unfairness of permitting a lessee to dedicate gas to be produced after his lease has expired.

(2) *The Fifth Circuit's inference of acquiescence on the part of Texas is unjustifiable under the facts of the case.*

There is no basis in fact for the Fifth Circuit's holding that Texas acquiesced or consented to the

[7]It apparently escaped the writers of the syllabi and the headnotes to the case as reported in 436 U.S. 519, 56 L.Ed. 2d 505, and 98 S.Ct. 1955 because in none of those reports was the matter of acquiescence ever mentioned.

interstate dedication of its gas. Assuming that Texas was fully apprised of the sale by Superior in interstate commerce and the certification of the sale,[8] before the state could consent to anything, it would need to know that it was consenting. Consent, like ratification, implies a knowing choice.

It is submitted that Texas, under the circumstances prevailing during the time it is held to have acquiesced, had no reason to believe that its failure to protest certification and its acceptance of royalties would imply consent. From the plain language of the Natural Gas Act, it had every reason to believe it was not and could not be a "natural gas company" subject to the Act. The regulatory provisions of the Act had never, up to that time, been applied to a state and the legislative history of the Act affirmatively showed that Congress had not intended to regulate states of the union.

Moreover, Texas was a royalty-owner, another reason for its not believing it was subject to the Natural Gas Act, because of the holding in *Mobil Oil Corporation v. F.P.C.*[9] in 1971, the year of Superior's certification. Even had it been selling its gas directly in interstate commerce, under *Panhandle Eastern Pipe Line Co. v. City of Rolla,*[10] it would have had no reason to anticipate regulation. Also, the holding in *El Paso Natural*

[8]There isno evidence in the record of this case to show when Texas acquired knowledge of the filing for and the obtaining of a certificate by Superior. As far as anything in the record shows, up until shortly before its letter to the Commission dated April 25, 1975, Texas may not have known of the certification process and therefore may not have had an opportunity to object.

[9]463 F.2d 256 (D.C.Circ. 1971) Cert. denied, 406 U.S. 976 (1972)

[10]26 F.P.C. 736 (1961)

Gas Company v. Perry R. Bass, 48 F.P.C. 1269 (1972), would reflect the prevailing thinking at the time Texas is supposed to have acquiesced. In that case, an owner of the right to convert a royalty reserved in a farm-out agreement to a portion of the working interest was permitted to exercise this right and to retrieve his share of the gas from a certificated sale in interstate commerce. True, this may no longer be the law, but it indicates the climate of opinion, circa 1972.

In holding that Texas should have anticipated that its failure to oppose Superior's sale and the state's acceptance of royalties would amount to acquiescence, the Fifth Circuit ascribed to Texas a prescience that it lacked itself in *Southland Royalty Co. v. Federal Power Commission*,[11] wherein it stated at page 1139:

> "Alternatively, the F.P.C. argues that Southland ratified Gulf's improper dedication of all leasehold gas to interstate commerce by acceptance of royalty payments during the term of the leases. Ratification implies knowing choice . . . By accepting that royalty petitioners received only that to which they were entitled under their lease . . . *Thus, lessors could not have known it would be claimed that Gulf's dedication of its gas affected their reversionary interest.*" (Emphasis added).

It is well recognized that acquiesience is a species of estoppel,[12] and the application of the doctrine of estoppel, including estoppel by acquiescence,

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[11]543 F.2d 1134 (5th Circ. 1976)

[12]Black's Law Dictionary, Revised 4th Ed. (1968), p. 40.

against federal or state governments is quite limited.[13] The Fifth Circuit's holding amounts to an application of estoppel arising out of the behavior of a state, Texas.

It should be considered that state employees, even at high levels, cannot be expected to be knowledgeable in the arcane lore of federal gas regulation. For one thing, up to now, the states have not been regulated. Therefore, to hold that the state is estopped through its failure to anticipate the consequences of not protesting certification of its gas seems unreasonable. This does not appear to be a case where a party in full possession of the facts and the law acted in such a way as to be estopped.

(3) *Southland does not hold that an entity's status as a "natural gas company" is irrelevant under Section 7(b).*

The Court states below:

> "Our reading of the recent Supreme Court decision in California v. Southland Royalty Co., 1978, 436 U.S. 519, 98 S.Ct. 1955, 56 L.Ed.2d 505, leads us to conclude that an entity's status as a 'natural gas company' is largely irrelevant to the question of whether that entity must seek abandonment authorization under §7(b)." (Appendix B, p. 7a).

Again, Petitioner fails to see here a categorical holding in *Southland* that it makes no difference whether or not an entity is a "natural gas company" under Section 7(b). This Court in *Southland* did not say that status as a "natural gas company" was

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[13]See 1 ALR2d 338-361; *U.S. v. Washington*, 233 F.2d 811 (9th Circ. 1956); *Texas Co. v. State of Texas*, 154 Tex. 494, 281 S.W.2d 149 (1955).

irrelevant. It said Respondents' argument was "somewhat beside the point." (436 U.S. at 528). The argument referred to was "that they should not be viewed as 'natural gas companies' with respect to the Waddell Ranch because they have not voluntarily committed any act that would place them within the Commission's jurisdiction."

Petitioner agrees with this Court's comment that such was beside the point. It was beside the point for the reason given by the Commission in its Brief in *Southland*:

> "...lessors who succeed to the interest of their natural gas company lessees would be natural gas companies within the meaning of the Act."[14]

In other words, where the reversionary owners became "natural gas companies" ipso facto upon the termination of their lease, whether they were before is beside the point. The same cannot be said of the State of Texas.

To say that Respondents' argument was "somewhat beside the point" is a far cry from saying status as a "natural gas company" is irrelevant. This Court may yet say that, but it has not yet held a state can become subject to the Commission regulations regardless of its status as a "natural gas company."

C. THE FIFTH CIRCUIT'S DECISION SANCTIONS AN IMPERMISSIBLE INTRUSION ON STATE SOVEREIGNTY.

In the recent case of *National League of Cities, et al, v. W.J. Usery*, 426 U.S. 833 (1976), certain 1974

[14]Quoted in dissenting opinion in *Southland* at 436 U.S. 519, 540.

amendments to the Fair Labor Standards Act, which extended the FLSA minimum wage and maximum hour provisions to most state and local employees, were held unconstitutional by the Supreme Court as a violation of state sovereignty protected by the Tenth Amendment. *Usery* establishes that, at some point, Federal intrusion into the affairs of state governments violates the constitutional scheme underlying the Federal system.

Petitioner respectfully urges on this court that if the Fifth Circuit decision stands, the effect of Commission regulation of state-owned gas would be an interference with a vital and basic function of state government,i.e., public education.[15]

Regulation under the Act involves price-fixing as well as other forms of regulation, and the Commission's setting the prices of state-owned gas has the same impact on the Texas government as the determination of the wages of state employees did in *Usery*. It is true that *Usery* involved increasing the costs of government, and this case involves diminishing the revenues available to the state for education, but the result is the same, i.e., a financial squeeze.

So far as Petitioner has been able to determine, no case has gone so far as to permit the federal government to set prices for which the states may sell their own natural resources with the exception of *Case v. Bowles*, 327 U.S. 92 (1946). This decision was not, however, based on the Commerce Clause as here, but involved only the war powers of Congress.

CONCLUSION

In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672

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[15]Under Article VII, Sections 2 and 5, Texas Constitution, all funds derived from mineral leases on state school lands, including the leases involved here, go into the Permanent School Fund, an endowment fund, the income from which is used in the support of public schools.

(1934), this Court took a quantum leap in extending the parameters of jurisdiction under the Natural Gas Act to include gas producers.

Twenty-five years after *Phillips*, another giant step may be eminent if the decision of the Fifth Circuit is left intact. This means that the gas-producing states of the union could be swept into the labyrinth of regulation. Such a result would violate the clear language of the statute, spawn administrative difficulties as the states are "shoe-horned" into the regulatory structure and raise a constitutional question under the Tenth Amendment.

Little useful purpose would appear to be served. The protection of interstate consumers from states of the union does not appear to be called for. No abuse of their exempt status has ever been attributed to the states.[16] The School Land Board of Texas cannot be equated to a profit-oriented interstate pipeline company.

In sum, Congress studiedly removed states from the reach of regulation and there should be no need for the Commission to seek theories or concepts, such as acquiescence, on which to base incursions into areas made "off-limits" by Congress. Congress set the parameters and it can change them, if necessary.

It is, therefore, respectfully requested that this petition for certiorari be granted.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

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[16]In this case, Texas sought to withdraw its royalty from the sale to Natural for sale to Public Service to enable the latter to alleviate a serious gas shortage in North Carolina.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 77-2728, 77-2746 & 77-2807

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, *Petitioner,*

versus

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent,*

STATE OF TEXAS, *Petitioner,*

versus

F.E.R.C., *Respondent,*

STATE OF LOUISIANA, *Petitioner,*

versus

F.E.R.C., *Respondent.*

On Petitioners for Review of Orders of the Federal Power Commission.

On Petition for Rehearing

(February 8, 1979)

Before BROWN, *Chief Judge,* GODBOLD * and RONEY, *Circuit Judges.*

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* Judge Godbold did not participate in the final decision. Pursuant to 28 U.S.C.A. 46(d), the decision is rendered by a quorum.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
John R. Brown

Chief Judge

APPENDIX B

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., State of Texas, State of Louisiana, Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent,

State of Alaska, State of New Mexico Energy Resources Board, Public Service Commission of the State of New York, Natural Gas Pipeline Company of America, Intervenors.

Nos. 77-2728, 77-2746 and 77-2807.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Jan. 11, 1979.

On Petitions for Review of Orders of the Federal Power Commission.

Before BROWN, *Chief Judge,* GODBOLD * and RONEY, *Circuit Judges.*

JOHN R. BROWN, *Chief Judge:*

This case presents the question whether a state, which is not a "natural gas company" under the Natural Gas Act (the Act), may nevertheless be made subject to the abandonment provisions of § 7(b) of the Act.[1] We conclude

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* Judge Godbold did not participate in the final decision. Pursuant to 28 U.S.C.A. § 46(d), the decision is rendered by a quorum.

[1] Section 7(b) of the Natural Gas Act, 15 U.S.C.A. § 717f(b), provides as follows:

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first

that where the state has consented to the interstate dedication of its gas, the state must obtain FERC approval prior to abandoning the certificated service.

I.

Much of Texas's public education system is financed from revenues received through the issuance of state oil and gas leases to producers, who then remit a royalty to the state.[2] In the case before us, in May, 1970, Texas, acting through its agency the School Land Board of Texas,[3] followed this scheme by issuing to Superior Oil Company (Superior) gas leases covering state-owned land.[4] In turn, Texas retained a royalty interest that could be taken either "for value" or "in kind.[5]" Pursuant to a 1971 Federal Power Commission certificate obtained by Superior,[6] all

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had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

[2] See Vernon's Tex.Civ.Stat. art. 5421c.

[3] We will use the term "Texas" to encompass both the state and its agency, the School Land Board, there being no significant legal distinction between the two entities.

[4] Three leases were eventually issued by Texas to Superior. Only the first two of these leases are involved in this case.

[5] The original leases between Superior and Texas did not provide for Texas's taking the gas in kind. In January, 1974, however, the parties amended their agreements so as to recognize Texas's right to take its royalty in kind.

[6] In the course of this litigation, the Federal Power Commission became the Federal Energy Regulatory Commission. Department of Energy Organization Act, Pub.L. 95-91, 91 Stat. 565 (August 4, 1977); Executive Order No. 12009, 42 Fed.Reg. 46267 (September 13, 1977). The new nomenclature makes no difference to the outcome of this case. So, to avoid any confusion we will herein-

the gas produced by Superior, both its own and that attributable to Texas's royalty share, was then sold in interstate commerce to Natural Gas Pipeline Company (Natural).

For several years, Texas received its royalty share in money. Then, on April 25, 1975, after the leases had been amended so as to permit the taking of royalties in kind,[7] Texas elected to take in kind. Shortly thereafter, Texas entered into an agreement to sell its royalty share to Public Service Company of North Carolina (Public Service), a natural gas distribution company. Upon learning of this contemplated transaction, the Commission informed the parties that Texas's royalty gas could not be diverted from Natural to Public Service without prior abandonment authorization from the agency.

Public Service then petitioned the Commission for an order declaring that the Commission had no jurisdiction to require abandonment authorization prior to Texas's taking its royalty gas in kind. In its Declaratory Order, the Commission concluded that, although neither Texas nor its agency was a "natural gas company" within the meaning of the Act,[8] both Texas *and* Superior were re-

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after refer to the federal energy agency merely as "the Commission," a term that encompasses either the FPC or FERC, as applicable.

The certificate referred to in the text is, of course, the "certificate of public convenience and necessity" required under § 7(c) of the Act. 15 U.S.C.A. § 717f(c).

[7] See note 5, *supra*.

[8] The Commission observed that although the definitions of § 2 of the Natural Gas Act did not specifically exclude a state as a "natural gas company," they did exclude state agencies. See 15 U.S.C.A. § 717a(1)-(3), (6). Since state agencies were expressly excluded from the definition of a "natural gas company," and since there was no legal distinction between a state and the agency

quired to seek abandonment authorization—Superior, because it had dedicated the gas reserves to interstate commerce, and Texas, because it had acquiesced in this dedication:

> [T]he reserves covered by . . . the first two leases were dedicated to interstate commerce when Superior made the sale to Natural. A certificate was issued . . . and gas was delivered. Texas did not object to this course of business until . . . it notified the Commission of its intention to take the royalty gas in kind. Once dedicated, the reserves remained dedicated and this is the result distinct from the underlying contractual arrangement.
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> * * * * * *
>
> Under the facts here, particularly the acquiescence of Texas in the interstate course of business we conclude therefore that, before Texas' royalty gas from the first two leases can be withdrawn from sale to Natural and transported and delivered to Public Service, Texas, or its agency, and Superior must obtain abandonment authority under Section 7(b) of the Natural Gas Act.[9]

Public Service unsuccessfully challenged the Commission's Order in administrative proceedings and now brings its Petition for Review in this Court.[10]

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through which it acts, the Commission reasoned that the state, as well as its agent, was excluded from the definition of a "natural gas company." Public Service Company of North Carolina, Inc., Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandonment Authorization, Docket No. RP76-103 (April 26, 1977) [hereinafter cited as Declaratory Order], at 4-5. We conclude that in this respect the Commission was correct.

[9] Declaratory Order, note 8, *supra*, at 8, 10.

[10] Also before this Court as petitioners are the states of Texas and Louisiana. In addition, the state of Alaska, the New Mexico

II.

Petitioners' main contention is that since a state is not, and never can be, a "natural gas company" under the Act, the Commission cannot require the state to seek abandonment authorization under § 7(b) of the Act, a section that is specifically limited to "natural gas companies." Moreover, petitioners argue, since a state cannot directly come within the ambit of § 7(b), the same result cannot be achieved indirectly by requiring Superior to seek abandonment authorization.[11]

As logical and as consistent with the statutory language as petitioners' argument might appear, we must nevertheless conclude that their position cannot be upheld. Our reading of the recent Supreme Court decision in *California v. Southland Royalty Company*, 1978, 436 U.S. 519, 98 S.Ct. 1955, 56 L.Ed.2d 505, leads us to conclude that an entity's status as a "natural gas company" is largely irrelevant to the question of whether that entity must seek abandonment authorization under § 7(b). As we see it, *Southland* establishes the principle that any party, whether a "natural gas company" or not, that acquiesces in the "dedication" of its gas to interstate commerce becomes obligated to continue the dedicated service or seek Commission approval to abandon it.

In *Southland*, Gulf acquired a 50-year leasehold interest in certain oil and gas reserves, with Southland and others retaining a reversionary interest in those reserves. As authorized by the terms of its lease, Gulf arranged to sell the production in interstate commerce. Accordingly, Gulf

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Energy Resources Board, the Public Service Commission of New York, and Natural have joined the proceedings as intervenors.

[11] Since we find that the Commission can directly require Texas to seek abandonment, we need not consider Texas's argument that such could not be done indirectly through Superior.

obtained a Commission certificate of unlimited duration and proceeded to transmit gas through the interstate market. Later, upon expiration of its lease, Gulf's interest in the reserves went to Southland and the other owners of the reversionary interest. These owners then sought to make an intrastate sale of the remaining gas reserves. Despite the fact that Gulf, a tenant for a term of years, had under Texas law no legal rights over the gas remaining after the termination of the lease, the Court determined that the lessee Gulf had, with the owners' approval, "dedicated" all the reserves to interstate commerce by transporting the gas in the interstate market subject to a certificate of unlimited duration:

> This issuance of a certificate of unlimited duration covering the gas at issue here created a federal obligation to serve the interstate market until abandonment had been obtained. The Commission reasonably concluded that under the statute the obligation to continue service attached to the gas, not as a matter of contract but as a matter of law, and bound all those with dominion and power of sale over the gas, including the lessor to whom it reverted.
>
> [T]he service obligation imposed by the Commission survived the expiration of the private agreement which gave rise to the Commission's jurisdiction.

Id. at 1959, 98 S.Ct. at 1959. Once this gas was so dedicated, the Court held, the owners could not divert it from interstate commerce without first seeking Commission authorization under § 7(b) of the Act.

The facts of the case before us are clearly analogous to those of *Southland*. Texas fully acquiesced in Superior's interstate transmission of *all* the production to Natural. Texas never objected to Superior's obtaining a certificate covering *all* the gas, and indeed, Texas profited from Superior's interstate dedication of the gas by accepting royal-

ty payments based on the interstate sales of its gas. Thus, to paraphrase the Court in *Southland*, Texas, having consented to Superior's interstate sales of gas, cannot now object to the rules and restrictions that accompany such sales. *Cf. id.* at 1960-61, 98 S.Ct. 1955.

Petitioners seek to distinguish the instant case from *Southland* on the grounds that the owners of the reversionary interest in *Southland* could become "natural gas companies," while Texas can never achieve this status. This may well be true. The argument, however, overlooks the major point of *Southland*—that it is the *dedication* of the gas that creates the service obligation. Indeed, in *Southland*, the Court refused to reach the question of whether the owners were "natural gas companies." Instead, the Court pointed out that whether or not the owners were "natural gas companies" was "[largely] beside the point, for the obligation to serve the interstate market had already attached to the *gas*, and respondents became obligated to continue that service when they assumed control of the gas." *Id.* at 528, 98 S.Ct. at 1960. Thus, the fact that Texas can never become a "natural gas company" is irrelevant once Texas has allowed its gas to be dedicated to interstate service.[12]

Petitioners also seek exemption from the abandonment requirement on the grounds that Superior did not have the legal authority to dedicate Texas's royalty gas, gas that Superior did not own. This argument was, however, handily disposed of in *Southland*, where the owners challenged Gulf's legal authority to dedicate their gas. Admitting the "appealing resonance" of the maxim that "'no man can dedicate what he does not own,'" the Court con-

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[12] Because it is the *fact* of dedication that is decisive, it is also irrelevant whether Texas could or could not take its royalty in kind from the inception of the contract with Superior. The existence of an *unexercised* right to take in kind has no consequence.

cluded that indeed he could. *Id.* at 528, 98 S.Ct. at 1960. Dedication is not a matter of a lessee's giving away or selling gas that it does not own, the Court explained, but rather a matter of changing the regulatory status of that gas. Superior's consented-to acquisition of the interstate certificate is effective to dedicate Texas's gas whatever the parties' relationship might be under local law.

We emphasize, however, that in our holding today we are deciding only the fate of royalty-owning states that seek to abandon interstate service after having consented to interstate transmission of gas pursuant to a Commission certificate issued to a natural gas company. Although the Commission stated in its Order that a state agency or state might be subject to the Natural Gas Act "where the context so requires," we expressly limit our holding to cover only the facts before us today. We do not decide what consequences would flow from the transmission of a state's gas without Commission authorization or without the state's acquiescence. Nor do we decide what results would obtain where the state itself initially sells directly in interstate commerce.[13] Instead, we repeat that it is the convergence of three factors—(1) interstate transmission by a natural gas company, (2) Commission certification, and (3) the state's acquiescence in (1) and (2) that gives rise to a continued service obligation.

III.

Although we find that most of the contentions raised by petitioners have been answered in *Southland*, there is one element of this case that distinguishes it from the prior

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[13] We observe that at oral argument, the attorney for the Commission conceded that Texas could directly sell its gas in interstate commerce without the necessity of a certificate and could later terminate its direct sales without the necessity of seeking abandonment authorization.

decision. That distinction stems from Texas's special status as a sovereign state of the Union.

Petitioners contend that the Commission's attempt to regulate state-owned gas amounts to an unconstitutional intrusion on state sovereignty.[14] As support for this proposition, petitioners cite the Supreme Court decision in *National League of Cities v. Usery,* 1976, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245. There, the Court ruled that Congress could not constitutionally extend provisions of the Fair Labor Standards Act to cover state and local employees: "[I]nsofar as the challenged [provisions] operate to *directly displace* the States' freedom to structure *integral operations* in *areas of traditional governmental functions,* they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 852, 96 S.Ct. at 2474 (emphasis added).

In this case, however, Texas's activities do not come under the protective mantle of *National League of Cities.* Texas's oil and gas business is not a "traditional governmental function" of the sort described by the Court in

[14] Before the Commission, intervenor New Mexico also contended that the Commission's action violated the "equal footing doctrine," in light of § 13(b) of the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C.A. § 719k(b), which requires the Commission to approve Alaska's withdrawals of dedicated gas for use within Alaska. The argument was that the Commission's action unconstitutionally subjected Texas to disparate treatment from that afforded Alaska. See Declaratory Order, note 8, *supra,* at 7, 10. This argument was not raised on appeal, and we do not consider it today.

Although the constitutional argument was abandoned on appeal, Texas did rely on § 719k(b) as an indication of congressional policy favoring the right of all states "to dispose freely" of their royalty gas. Brief for Petitioner the State of Texas, at 15. From our reading of the Alaska Natural Gas Transportation Act and its legislative history, we do not find sufficient support for this interpretation that goes beyond the clear language of the statute.

National League of Cities.[15] Instead, the business engaged in by Texas is an operation indistinguishable from like commercial activities of private business. It is precisely this sort of state activity that may be subject to federal regulation. *See id.* at 854 n. 18, 96 S.Ct. 2465.[16]

Moreover, it cannot be said that federal regulation here will "directly displace" a traditional governmental function. Commission regulation may well affect the amount of revenues received into the school fund. This indirect effect, however, comes nowhere near constituting a federal usurpation of state control over public education in Texas.

Finally, we find helpful the balancing approach suggested by Justice Blackmun, who provided the "swing vote" in *National League of Cities,* 426 U.S. at 856, 96 S.Ct. 2465 (Blackmun, J., concurring). In applying that test here, we have determined that the important federal interest in securing a continuous supply of natural gas in interstate markets outweighs the incidental effect that Commission regulation might have on the school children of Texas.

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[15] As examples of traditional functions of state and local governments, the Court cited police and fire protection, sanitation, public health, and parks and recreation. 426 U.S. at 851, 96 S.Ct. 2465.

[16] The Court sanctioned this principle by approving its prior holding in *United States v. California,* 1936, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567. In that case, the Court determined that a state-owned railroad operating in interstate commerce was subject to the federal Safety Appliance Act: "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers . . . ." *Id.* at 185, 56 S.Ct. at 424. *See also Parden v. Terminal Railway of the Alabama State Docks Department,* 1964, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (state's operation of railroad in interstate commerce constitutes waiver of sovereign immunity in suit brought under the Federal Employers' Liability Act).

Accordingly, because we find that Texas permitted the interstate dedication of its gas, and because the state activity in question here is properly subject to federal regulation, we hold that the Commission correctly concluded that Texas must seek abandonment authorization prior to withdrawing its gas from service to Natural.

ENFORCED.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

Docket No. RP76-103

Public Service Company of North Carolina, Inc.

Order Denying Rehearing

(Issued July 6, 1977)

The Public Service Company of North Carolina, Inc. (Public Service), the State of Texas and the State of Louisiana on May 26, 1977, have filed applications for rehearing with respect to the Commission's order of April 26, 1977, in the present docket. As related in that order Public Service petitioned the Commission for a declaratory order determining that it has no authority under the Natural Gas Act to require that abandonment authorization be obtained for royalty gas owned by Texas which is being sold to Natural Gas Pipe Line Company of America (Natural) by Superior Oil Company, but which Texas wishes to sell to Public Service.

The Commission determined that neither a state or its agency is a natural gas company and subject, as such, to the jurisdiction of the Commission. However, the Commission held that the gas reserves representing the royalty of Texas, or an agency, under lease to Superior by Lease Nos. M-58093 and M-58094 in the High Island Field in the Gulf of Mexico have been dedicated to interstate commerce by the sale of gas to Natural, and before it is withdrawn from such sale Texas, or its agency, and Superior must obtain abandonment authorization under Section 7(b) of the Act.

The Commission asked for information with respect to deliveries to Natural with respect to a third lease, No. M-69629. By letter filed May 6, 1977, Superior stated that the drilling on the lease resulted in a dry hole and that Texas has never taken its royalty gas in kind from this lease. We therefore exclude Lease No. M-69629 from any of the determinations made in this proceeding.

The applicants for rehearing all object to our determination that Superior and Texas, or its agency, must obtain abandonment authorization before selling to Public Service the royalty gas from the first two leases. Public service notes that the gas purchase contract between Superior and Natural dated May 7, 1971, (Superior's FPC Gas Rate Schedule No. 150) provides on page 6 that the seller reserves gas "to fulfill obligations to Seller's Lessors under the terms of such leases" and this means that the gas has not been dedicated to Natural but is subject to Seller's obligations to deliver to Texas royalty volumes in-kind upon the exercise by the State of its statutory option to take such gas. As explained in our order of April 26, 1977, the original leases did not grant Texas the privilege of taking its gas in kind nor did the statute (Article 5421C, Section 8 of Vernon's Texas Civil Statutes) so provide. Therefore Texas did not reserve a right to use royalty gas elsewhere until entering into the new pooling agreement of January 10, 1974. In any case, Texas had acquiesced in the sale of gas from the two leases in interstate commerce and the entire leasehold interest had been dedicated to interstate commerce. *Phillips Petroleum Co.* v. *F.P.C.*, —— F.2d —— (CA10-May 17, 1977).

Since the filings of the applications for rehearing the court's opinion in *Pennzoil Producing Company* v. *F.P.C.*, —— F.2d —— (CA5-June 6, 1977), No. 76-1626 et al., has been issued. There gas was sold by Pennzoil and Shell to United Gas Pipe Line Company from leases in Terrebonne Parish, Louisiana. The leases provided for a royalty of a fraction of the value of the gas produced calculated at the

market rate prevailing at the well. Some years after the execution of the leases the lease holder, Williams, demanded payment of royalties at a much higher rate based on market values. Under a settlement Pennzoil and Shell agreed to ask the Commission for special relief on the interstate price or authority to abandon the sale of the royalty gas. The Commission denied both alternatives. On the abandonment question the court said that in denying abandonment the Commission was under the impression that Williams' gas was trapped in the interstate market, whether or not the leases were terminated and it might well be that the present or future public convenience or necessity will suggest the propriety of abandoning the royalty fraction of the gas rather than losing the whole amount from the interstate market.

In our opinion there is a distinction between *Pennzoil* and the present case. There the leaseholder was exercising his rights to a higher royalty existing in the leases before the sale of the gas in interstate commerce. Here there was no question of failing to pay the agreed upon royalty and the leaseholder, Texas, did not acquire its right to take the royalty gas in kind until after the dedication to interstate commerce. Furthermore, unlike *Pennzoil,* no abandonment was sought here but merely a declaratory order that we had no jurisdiction to require abandonment authorization.

In other respects the contentions made on rehearing are, in general, similar to those originally made and further discussion is not necessary.

The Commission further finds:

The assignments of error and grounds for rehearing of the Commission's order of April 26, 1977, in the applications for rehearing filed by Public Service, Texas and Louisiana present no facts or legal principals that would warrant any change in or modification of the Commission's order as supplemented herein.

The Commission orders:

The applications for rehearing filed by Public Service, Texas and Louisiana are denied.

By the Commission.

(Seal)

Kenneth F. Plumb,
Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: RICHARD L. DUNHAM, Chairman; DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

Docket No. RP76-103

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

Declaratory Order on Jurisdiction Over State Activities and on Necessity for Abandoning Authorization, and Denying Oral Argument

(Issued April 26, 1977)

Public Service Company of North Carolina, Inc. (Public Service) on May 24, 1976, petitioned the Commission for a declaratory order determining that it has no authority under the Natural Gas Act to require that abandonment authorization be obtained for royalty gas owned by the State of Texas which is being sold to Natural Gas Pipe Line Company of America (Natural), by Superior Oil Company (Superior) under its Rate Schedule No. 150 currently at a price of 32.117 cents per Mcf, but which Texas wishes to sell to Public Service employing the pipeline of Transcontinental Gas Pipe Line Corporation (Transco) to transport the gas.

The gas reserves involved are in the High Island Field, offshore in the State of Texas and are presently under lease to the Superior Oil Company. Originally there were two leases,[1] but on January 10, 1974, the Commissioner of the General Land Office on behalf of Texas with Superior

[1] Texas Lease Nos. M-58093 and M-58094.

and Natural entered into a new pooling agreement to add an additional lease [2] and to provide, among other things, that Texas may at its option upon not less than 60 days written notice require that payment of all royalties be made in kind. Upon application by Superior, the Commission on February 11, 1975, issued an order amending its certificate with an ordering clause covering a number of certificates stating that the certificate "does not imply approval of all of the terms of the contracts, particularly as to the cessation of the service upon termination of said contracts as provided by Section 7(b) of the Natural Gas Act." [3]

On April 25, 1975, Texas notified the Commission of its intention to take the royalty gas in kind, but the Secretary by direction of the Commission, on June 13, 1975, informed Texas that the February 11, 1975, order did not authorize Superior to divert dedicated gas from the interstate market without abandonment authorization. On May 1, 1975, Texas acting by and through the School Land Board of Texas, an agency of the State, entered into an agreement with Public Service for the sale of the royalty gas. The price would be $1.44 per Mcf and the quantity would be 1,100,000 Mcf per year. The gas would be transported by Transco, which is now supplying Public Service, but Transco will not agree to transport the gas until the Commission rules that abandonment need not be sought. In its petition filed May 24, 1976, Public Service recited the background facts and argued that the Commission should issue a declaratory order determining that it has no jurisdiction to require that abandonment authority be sought prior to the sale and delivery of Texas' royalty gas to Public Service.

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[2] Texas Lease No. M-69629.

[3] *Skelly Oil Company, et al.*, Docket No. G-5354 et al., issued February 11, 1975, including *The Superior Oil Company*, Docket No. CI71-870.

On October 5, 1976, the Commission issued an order asking that briefs be submitted to the Commission on the following issues:

(1) Within the meaning of Section 2 of the Natural Gas Act, is there any legally applicable difference between a State of the United States and an agency of a State?

(2) Is a State of the United States subject to the jurisdiction of the Commission under the Natural Gas Act?

(3) If a State is a jurisdictional entity, does that automatically make any agency of the State jurisdictional, or if it is a separate question then whether the agency is jurisdiction?

(4) If a State is not jurisdictional, can an agency of the State be jurisdictional?

(5) If the Commission has no jurisdiction over a state or an agency of the state, can the Commission then require the present producer of the states' or state agency's royalty share to obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act prior to the state or its agency selling the subject gas in interstate commerce?

On the first four questions the Office of General Counsel (OGC) in the Commission's staff brief, Public Service, the State of Alaska, the State of Louisiana, the Public Service Commission of the State of New York, the State of Texas and the State of New Mexico argue variously (1) that there is no legally applicable difference between a state and its agency, (2) that a state is not subject to the jurisdiction of the Commission, (3) that even if a state is jurisdictional, and they say it is not, its agency would not be jurisdictional, and (4) that if a state is not jurisdictional, its agency, in any case, would not be jurisdictional. The arguments of Public Service, OGC and the intervening states are based on the Natural Gas Act, certain cases and the Constitution and will be discussed below.

On the other hand, in the staff brief the Bureau of Natural Gas (BNG) argues that Congress meant to create a comprehensive and effective regulatory scheme without leaving gaps contrary to the public welfare, citing *Panhandle Eastern Pipe Line Company* v. *Public Service Commission,* 332 U.S. 507 (1947) and *F.P.C.* v. *Louisiana Power and Light Co.,* 406 U.S. 621 (1971). BNG says that to conclude that Section 2 controls jurisdiction because it excludes a state agency from the definition of a "person" and therefore from the term "natural-gas company" is an unreasonable, unrealistic construction of the Natural Gas Act, and subverts the purpose of the statute. It observes that Section 2 initially provides that "When used in this Act, unless the context otherwise requires—", before setting forth the definitions.

BNG notes that volumes of natural gas now flowing in interstate commerce which represent the royalty component contractually accruing to states or agencies of states are very large. It says that a conclusion that volumes currently flowing in interstate commerce unequivocably are subject to Section 7(b), and thus cannot be removed from interstate commerce without affirmative approval by the Commission, may be misleading. Thus, if Section 2 can be interpreted as controlling the jurisdictional provisions in Section 1, it should also control Section 7, including Section 7(b) relating to abandonment. BNG argues that the potential impact of conceding a loophole in the act relating to state or other agencies does not stop here. Prospectively states could build pipelines across state lines or across the international border without approval of the Commission. Further, states or their agencies could build pipelines, acquire royalty interests, accomplish transportation or sales in interstate commerce, and engage in acts which are within the purpose of the Natural Gas Act and which existing Commission policy prohibits in regard to natural gas companies.

The American Public Gas Association (APGA) believes that under Section 2 of the Act both a state and its agencies are exempted from regulation but through their acts may voluntarily accept Commission regulation over particular transportation activities and sales for resale in interstate commerce. It refers to Section 1(b) giving the Commission jurisdiction over (1) transportation of gas in interstate commerce, (2) sales for resale in interstate commerce and (3) natural-gas companies. Thus, it says, any sale of gas for resale or transportation of gas involved in a direct sale in interstate commerce made by Texas is subject to FPC jurisdiction even though the state itself is exempt from the Act. Furthermore, the sale of Texas' royalty gas in interstate commerce by Superior to Natural for resale is subject to FPC jurisdiction because Texas has consented to such jurisdiction through the grant of a certificate to Superior and the subsequent amendment which encompassed all of the gas from the dedicated acreage owned by Texas including its royalty interest.

The definitions in Section 2 of the Natural Gas Act do not specifically exclude a state as a "natural-gas company", but do exclude state agencies. In section 2(6) a "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale". Under Section 2(1) a " 'person' includes an individual or a corporation". Under Section 2(2) a "Corporation" does not include "municipalities", a term under Section 2(3) meaning "a city, county, or other political subdivision or agency of a State". The agencies of states, such as the School Land Board of Texas, are thus in terms excluded from the jurisdiction of the Commission.

In *F.P.C.* v. *Corporation Commission of Oklahoma,* 362 F.Supp. 522, 544 (W.D. Okla.—1973); affirmed without opinion but with dissent 415 U.S. 961 (1974), a state agency was treated as a person. There the District Court upheld the right of the Commission to bring suit against a state

commission which had attempted to set minimum prices for gas entering interstate commerce. Section 20(a) of the Act permits suits against a "person" and the Court said that the state commission could be considered a "person" because Section 2(1) says that "person" "includes" an individual or corporation and the word "includes" is not a word of limitation but a word of enlargement. Therefore a state commission could be a non-individual person where, as here, the legislative environment so indicated. The purpose of the court here was to afford the FPC the procedural opportunity to protect its jurisdiction over interstate gas rates. This does not mean that a state agency is to be considered a "person" and a "natural-gas" company otherwise under the provisions of the Natural Gas Act although it may be subject to the Act where the context so requires.

Similarly, under the Federal Power Act the Court treated a county as a person in spite of the literal meaning of the definitions. *United States* v. *Public Utilities Commission*, 345 U.S. 295 (1953). There the question arose whether the Commission had jurisdiction over a sale to Mineral County for resale where a jurisdictional sale at wholesale was defined in Section 201(d) as "a sale of electric energy to any *person* for resale". Other definitions in Section 3 excluded the County as a "person", but the Court held that Congress did not intend to exclude such a sale from Commission regulation. While Section 3 did not have any saving language relating to context as does the Natural Gas Act the Court found, in effect, that, in the context of the definition of a sale at wholesale, "person" included a county.

A state, while not in terms excluded by Section 2, is not included in the definition of a "person" and hence of a "natural gas company". A state is not an individual and is not included in the definition of "corporation". Furthermore, the provisions of the Act indicate that states are not intended to be natural-gas companies. Thus Section 19(a)

lists "any person, state, municipality or state commission" specifically and separately. Also, the legislative history of the Natural Gas Act makes it clear that the purpose of the Act was to occupy the field in which the Supreme Court has held that the states may not act and it takes no authority from state commissions.[4] In *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507, 517-518 (1947) it was said, "The Act, though extending federal regulation, had no purpose or effect to cut down state power". The language of Section 1, cited by BNG, provides for Commission authority over the transportation and sale of natural gas in interstate commerce and over natural-gas companies, but that section does not define natural-gas companies. That definition is left to Section 2, and there is nothing in the context of Section 1 that would indicate that states or their agencies are considered to be natural-gas companies.

We conclude that neither a state agency or a state is a natural-gas company subject to the jurisdiction of the Commission although they may be subject to the Act where the context so requires, and it follows that there is no legally applicable difference between them. To make any difference between them would be unrealistic, for a state usually acts through an agency; and in any case, if an agency was excluded from jurisdiction while a state was not, the state would arrange that any royalty gas sales be made through the state agency.

We agree with BNG that FPC regulation was to be broadly complementary to that reserved to the states, that regulation and matters relating to the transportation and sale of natural gas in interstate commerce is necessary in the public interest, that the Act must be read in its entirety and there may be untoward consequences in the states' selling their royalty gas on a large scale in interstate commerce.

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[4] H. Rep. 709, 75th Cong., 1st Sess., p. 2.

But the intention of Congress was to leave state jurisdiction intact, and to regulate interstate commerce in that context. Accordingly, we conclude that for the purpose of this proceeding questions (1) and (2) should be answered in the negative. On question (3), even if a state were jurisdictional, a state agency would not be jurisdictional by the plain meaning of Section 2. On question (4) if a state is not jurisdictional, the agency could not be jurisdictional and, in addition, is excluded specifically by Section 2.

Question (5) as to whether the Commission can require the present producer of the state's or state agency's royalty share to obtain Section 7(b) abandonment is a more complicated question. To this we must add a preliminary question whether even though Texas, or its agency, are not natural gas companies they have so submitted their royalty gas to interstate commerce that they cannot withdraw it without the permission of this Commission. Natural, APGA, the New York Commission and our staff contend that Superior must obtain abandonment before the royalty gas may be withdrawn from sale to Natural and sold to Public Service. Contrary are Public Service, Alaska, Louisiana, Texas, and New Mexico.

Staff argues that where reserves have been dedicated to interstate commerce, in the absence of jurisdiction over Texas or its agency, Superior, a natural gas company is required to satisfy the requirements of the Act which include obtaining partial abandonment authorization prior to diverting the flow in interstate commerce. If the Section 7(b) authorization is granted, the Staff says, the state would be free to take its royalty gas in kind and sell it for resale without any Commission authorization. Where there has been no dedication to interstate commerce, however, then the producer, Superior, would not be required to obtain abandonment authorization.

Natural argues that Section 7(b) was intended to protect consumers and that the jurisdictional seller, Superior, must

obtain prior approval of the partial abandonment. Further, Texas should be viewed as any other nonjurisdictional royalty owner who has elected to take his royalty in kind pursuant to an option, and to allow Superior to ignore the Section 7(b) requirements would allow any producer to divert gas from interstate commerce.

APGA says that the producer, Superior, must seek Section 7(b) abandonment authorization before stopping the sale of any of the gas in question because it is Superior which has the permanent certificate and cannot violate its certificate obligations. APGA objects to gas already committed to interstate commerce being withdrawn and sold to different interstate consumers at unregulated prices. If this is allowed, gas might be sold intrastate, APGA points out.

The New York Commission argues that the objective of Section 7(b) was to protect the consumers from having service upon which they have relied eliminated whenever a seller had the contractual right to terminate. It says there is no material difference to a pipeline or distributor whether the gas sought to be removed from service is owned or controlled by an entity which cannot be a natural-gas company. Therefore, once the state, or an agency, permits a natural gas company to dedicate its interests in gas reserves to interstate commerce the resulting service must be continued until abandonment is authorized.

The opponents variously argue that the Commission has no jurisdiction over a state or its agency and cannot require the producer of the state's royalty gas to obtain abandonment approval. Further, Superior's marketing the royalty gas and making royalty payments cannot alter the nonjurisdictional nature of the original sale. Any other result, they say, would be tantamount to a requirement of prior Commission approval of a state sale of royalty gas, and this would frustrate the Congressional purpose and be in derogation of state sovereignty. Furthermore, a consequence of this position, they add, is that the supply of

natural gas in interstate commerce may be increased. New Mexico takes a different view saying that the only control over Texas can come when it sells its royalty gas in interstate commerce for resale. New Mexico also makes the point that every state is admitted to the Union on an equal footing and, since Alaska is permitted under Section 13(b) of the Alaska Natural Gas Transportation Act of 1976 [8] to withdraw gas from the interstate market for use within Alaska, Texas must be permitted to do so also.

As to our authority to require Texas, or its agency, to seek abandonment, we note that Section 7(b) states that "no natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, *or* any service rendered by means of such facilities, without [our] permission . . . ." Texas and its agency are not natural-gas companies. However, the reserves covered by, at least, the first two leases were dedicated to interstate commerce when Superior made the sale to Natural. A certificate was issued covering the first two leases on November 8, 1971, and gas was delivered. Texas did not object to this course of business until on April 25, 1975, when it notified the Commission of its intention to take the royalty gas in kind. Once dedicated, the reserves remain dedicated and this is the result distinct from the underlying contractual arrangement. *Atlantic Refining Co.* v. *N.Y. Pub. Service Comm.*, (CATCO), 360 U.S. 378, 389 (1959); *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 152 (1960).

As for the third lease, an amended certificate was issued on February 11, 1975,[9] but we have no definite information available in the record or otherwise as to whether gas was delivered from the third lease to Natural before Texas notified us of its intention to take the royalty in kind. However,

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[8] Pub. L. 94-586 (Oct. 22, 1976).

[9] *Skelly Oil Co., supra.*

actual delivery is significant in determining when a commitment to interstate commerce occurred, but not dispositive. In the absence of further information concerning deliveries, we hold that the acceptance of the amended certificate constituted an interstate commerce commitment.

Under these particular conditions, we are of the opinion that the gas from the first two leases that has been dedicated under Section 7(c) of the Act to interstate commerce by a natural-gas company, Superior, became encumbered with the obligations of such dedication including those set forth in Sections 7(e) and 7(b), and Texas or its agency cannot withdraw it from the interstate sale to Natural without the authority of this Commission. As said in *Hunt* v. *F.P.C.*, 306 F.d 334, 342 (CA5-1962), rev'd on other grounds, 376 U.S. 515 (1964) the duty to continue to deliver gas is like an ancient covenant running with the land.

Texas notes that Article 5421C, Section 8 of Vernon's Texas Civil Statutes, provides that the royalty reserved to the State "shall be not less than ⅛th of the gross production or value of oil, gas and sulphur" and argues that under this statute, enacted in 1931, the state has the option either to take its royalty reservation in gross production of the oil or gas or be paid in cash based on the value. Thus it says Superior's certificate of public convenience and necessity does not and cannot apply to the state's royalty share of production.

The statute does not appear to say this. It protects the state from too low a royalty whether the royalty is taken in kind or in money, but does not attempt to provide that the state has a continuing option to take its royalty in kind or in money. It appears that under the original two leases there was no provision for taking the gas in kind. This was not provided until the amendment of January 10, 1974, nor exercised until April 25, 1975. In any case regardless of the meaning of the Texas statute or of the change in the lease

Texas had acquiesced in the sale of gas in interstate commerce, at least with respect to the first two leases.

On question 5 as to whether we can require Superior to obtain abandonment authorization before the Texas royalty gas is sold to Public Service the issue is whether Superior has any service under its leases which it can be required to seek authorization to abandon. In our opinion Superior, a natural-gas company, has clearly dedicated the reserves covered by the original two leases to interstate commerce. As noted above, it received a certificate and gas was delivered and, as in the case of Texas, once dedicated, the reserves remain dedicated. We do not have sufficient information on the third lease.

Since the briefing in the present case the opinion of the Court of Appeals in *Southland Royalty Company* v. *F.P.C.*, —— F.2d —— (5th Cir., Dec. 13, 1976), has been issued. There it was held that when the 50-year fixed-term leases terminated under Texas law the interest of the lessees terminated and the gas reserves in the lease were not subject to actions the lessees might have taken to dedicate the leases to interstate commerce. Here there was no such limitation on the term of any of the leases. The right of Texas to take its royalty in kind was not added until the pooling agreement of January 10, 1974. The first two leases were thus free of any such condition until that date and Superior by agreement with the State cannot contract a previous dedication to interstate commerce away from interstate commerce. We find that this subsequent agreement cannot have the effect of subverting the prior lawful dedication made by Superior. The third lease still remains in effect even if Texas were to take its royalty in kind. In any case the determinations made in *Southland* are still subject to litigation for El Paso Natural Gas Company and the State of California and the Public Utilities Commission of California have petitioned the Supreme Court for a writ of *certiorari* and the Commission will file its petition shortly.

As to the argument that Texas should be treated on an equal footing with Alaska, which can withdraw gas from interstate commerce under the Alaska Natural Gas Transportation Act, there is no reason why Texas should be treated in the same way as Alaska. It is held that when a state is admitted to the Union she becomes possessed of all the rights of dominion and sovereignty which belonged to the original states. *Escanaba Co.* v. *Chicago,* 107 U.S. 678, 688-689 (1883). Texas was admitted into the Union on an equal footing with the original states. *United States* v. *Texas,* 143 U.S. 621 (1892). The requirement of equal footing was not designed to wipe out the diversities of area, location, geology and latitude, but to create parity as respects political standing and sovereignty. *United States* v. *Texas,* 339 U.S. 707, 716 (1950). Thus it was held that airlines operating between the islands of the State of Hawaii were subject to CAB jurisdiction. *Island Airlines* v. *C.A.B.,* 363 F.2d 120, 123 (CA9-1966). The Court said that federal regulations which is otherwise valid is not a violation of the "equal-footing" doctrine merely because its impact may differ between various states because of geographic or economic reasons.

Under the facts here, particularly the acquiescence of Texas in the interstate course of business we conclude therefore that, before Texas' royalty gas from the first two leases can be withdrawn from sale to Natural and transported and delivered to Public Service, Texas, or its agency, and Superior must obtain abandonment authority under Section 7(b) of the Natural Gas Act. Because the briefs fully cover the issues involved there is no need for oral argument as requested by New Mexico.

The Commission further finds:

(1) Neither a state of the United States nor any state agency are natural-gas companies subject to the jurisdiction of the Commission within the meaning of the Natural Gas Act.

(2) The gas reserves representing the royalty of the State of Texas, or an agency, under lease to Superior by Lease Nos. M-58093 and M-58094, in the Gulf of Mexico in Block No. 14-L, High Island Field, Jefferson County, Texas, have been dedicated to interstate commerce, and before it is withdrawn from sale to Natural, Texas, or its agency, and Superior must obtain abandonment authorization under Section 7(b) of the Natural Gas Act.

The Commission orders:

(A) Oral argument is denied.

(B) Within 30 days Superior shall submit a statement with respect to Lease No. M-69629 showing when deliveries to Natural commenced and the amount of deliveries each month through April 1975. Superior should also indicate whether the State of Texas has ever taken its royalty gas in kind from this lease and, if so, when.

(C) Within 30 days of Superior's filing all parties may comment on its legal effect.

(D) The gas reserves representing the royalty of the State of Texas, or an agency, under lease to Superior by Lease Nos. M-58093 and M-58094, in the Gulf of Mexico in Block No. 14-L, High Island Field, Jefferson County, Texas, have been dedicated to interstate commerce, and before it is withdrawn from sale to Natural, Texas, or its agency, and Superior must obtain abandonment authorization under Section 7(b) of the Natural Gas Act.

By the Commission. Commissioner Watt, concurring, filed a separate statement appended hereto.

(Seal)

Kenneth F. Plumb,
Secretary.

Public Service Company of)
North Carolina, Inc.) Docket No. RP76-103

(Issued April 26, 1977)

WATT, Commissioner, *concurring:*

The present order needlessly addresses issues not before us, and answers those issues in ways with which I cannot now agree.

All that need be decided in this case is whether the right of the State of Texas to take royalty gas in kind, a right which did not come into being until several years after the gas was dedicated to interstate commerce, permits the state to withdraw that gas from interstate commerce without prior abandonment authorization from this Commission. For the reasons set forth in the order limited to this one issue I would find abandonment authorization to be required under the facts of this case.

/s/ JAMES G. WATT
Commissioner

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: RICHARD L. DUNHAM, Chairman; DON S. SMITH, JOHN H. HOLLOMAN III, and JAMES G. WATT.

Docket No. RP76-103

PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

Order Setting Question for Briefs and Providing for Additional Notice Period

(Issued October 5, 1976)

On May 24, 1976, Public Service Company of North Carolina, Inc. (Public Service) filed a petition for a declaratory order determining that the Commission is without jurisdiction to require abandonment prior to the transportation in interstate commerce of royalty gas taken in-kind by the State of Texas (Texas).

Superior Oil Company (Superior) presently makes a jurisdictional sale to Natural Gas Pipe Line Company of America (Natural) from two leases in the High Island Area, offshore State of Texas. On January 10, 1974, the Commissioner of the General Land Office on behalf of the State of Texas, together with Superior, and Natural, agreed to amend the existing pooling agreement covering the subject property to add an additional lease to the agreement and to permit Texas, after proper notice, to take its royalty share of gas in-kind.

Superior applied to amend its certificate on August 2, 1974 requesting the addition of the new lease to the dedicated acreage and noting the royalty in-kind provision. On

February 11, 1975, the Commission issued an order amending Superior's certificate and accepting for filing the amendment to add acreage as Supplement No. 3 to Superior's Rate Schedule No. 150. Ordering Paragraph (C) of that order stated that the grant of the certificate was subject to the requirements of Section 7, and that it does not imply approval of all the terms of the contract, especially as they may relate to the cessation of service.

On April 25, 1975, the State of Texas wrote to the Commission giving notice of its intention to take the royalty share in-kind and sell the gas on its own. Texas asserted that it is not subject to the Commission's jurisdiction and does not require a certificate for its action. On June 13, 1975, the Secretary, by direction of the Commission, informed Texas that the February 11, 1975 order did not authorize Superior to divert dedicated gas from the interstate market without abandonment authorization.

On May 1, 1975 Public Service entered into a contract with the "State of Texas, acting by and through the School Land Board of Texas, an agency of the State of Texas," for the sale of the royalty gas. This agreement calls for the sale of approximately 1,100,000 Mcf per year at a rate of $1.44 per Mcf.

The subject of the instant proceeding is the petition of Public Service for a declaratory order that the Commission has no authority to require Texas to seek abandonment authorization of the reserves to be sold by it to Public Service pursuant to their May 1, 1975 contract. Public Service is presently supplied by Transcontinental Gas Pipe Line Company (Transco) but Transco will not transport the Texas gas sale without a Commission ruling that abandonment is not necessary.

Notice of the Public Service petition was issued on June 2, 1976, and appeared in the Federal Register on June 9,

1976 at 41 FR 23248. Petitions to intervene have been filed by American Public Gas Association (APGA), Natural, Tennessee Gas Pipeline Company (Tennessee), and United Gas Pipe Line Company (United). Notices of intervention were filed by the States of Alaska and Louisiana, the Public Service Commission of the State of New York (NYPSC), and the Energy Resources Board of the State of New Mexico and The Commissioner of Public Lands of the State of New Mexico (New Mexico).[1]

Public Service argues that the Commission has no jurisdiction over the State of Texas or its agent and cannot, therefore, require Texas to obtain abandonment authorization prior to making the sale to Public Service. According to the contract, the seller is listed in one place as the "Commissioner of the General Land Office and Chairman of the School Land Board" and in another place as the "State of Texas, acting by and through the School Land Board of Texas, an agency of the State of Texas."

The jurisdiction of the Commission is limited to the regulation of a "natural gas company," which is defined in Section 2(6) of the Natural Gas Act,[2] as a "person" engaged in certain activities. A "person", in turn, is defined in subsection (1) as an individual or corporation. Individual is undefined. A corporation is defined in subsection (2) as:

> any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

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[1] APGA, NYPSC and The Energy Resources Board of the State of New Mexico and The Commissioner of Public Lands of the State of New Mexico did not file in a timely manner but their respective petitions and notices will be permitted as in the public interest.

[2] 15 U.S.C. § 717a (1963).

Subsection (3) states that a municipality "means a city, or other political subdivision or agency of a State." A state is defined in subsection (4) as a "State admitted to the Union, the District of Columbia, and any organized Territory of the United States."

This is a case of first impression for the Commission. The petition of Public Service sets out a fundamental question of jurisdiction that should be explored fully before the Commission renders its final decision in this matter. Therefore, since there are no apparent questions of fact, the Commission will require initial and reply briefs be submitted directly to the Commission on the following issues:

(1) Within the meaning of Section 2 of the Natural Gas Act, is there any legally applicable difference between a State of the United States and an agency of a State?

(2) Is a State of the United States subject to the jurisdiction of the Commission under the Natural Gas Act?

(3) If a State is a jurisdictional entity, does that automatically make any agency of the State jurisdictional, or is it a separate question then whether the agency is jurisdictional?

(4) If a State is not jurisdictional, can an agency of the State be jurisdictional?

(5) If the Commission has no jurisdiction over a State or an agency of the State, can the Commission then require the present producer of the States' or state agency's royalty share to obtain abandonment authorization pursuant to Section 7(b) of the Natural Gas Act prior to the State or its agency selling the subject gas in interstate commerce?

We request that the briefs on these issues answer the questions both in the context of the specific factual situation presented in the Public Service petition and generally with reference to State and state agency distinctions, if any. The issues posed and any collateral matters raised by

these questions should be fully and completely explored in the briefs.

We especially invite the comments of all interested persons, whether or not a petition to intervene or notice of intervention has been filed as yet in this proceeding. Because of the importance of the jurisdictional question posed, we will provide an additional period of ten days from the date of issuance of this order for other interested persons to file a petition for intervention or notice to intervene. Persons filing during this period will be required to file copies of the petition or the notice on all parties. The Commission will act on these petitions or notices prior to the date for filing the initial briefs.

The Commission finds:

(1) It is in the public interest that this matter be set for the submission directly to the Commission of briefs on the legal issues posed herein, said briefs can be filed by any party to this proceeding or any other interested person.

(2) Good cause exists to grant the petitions and notices of intervention of APGA, Natural, Tennessee, United, Alaska, Louisiana, NYPSC and New Mexico.

(3) It is in the public interest to provide an additional ten day period in which interested persons may file a petition to intervene or a notice of intervention in order to participate in this proceeding.

The Commission orders:

(A) Initial briefs on the legal issue posed herein, and any related legal questions, should be filed on or before November 5, 1976, with replies thereto to be filed on or before November 30, 1976.

(B) APGA, Natural, Tennessee, United, Alaska, Louisiana, NYPSC, and New Mexico are permitted to intervene in this proceeding for relief subject to the Rules and

Regulations of the Commission; *Provided, however,* that the participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions for leave to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order or orders of the Commission entered in these proceedings, and that the intervenors agree to accept the record as it now stands.

(C) Any person desiring to be heard or to protest the Public Service filing should file a petition to intervene or protest with the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, and all other parties to the proceeding, in accordance with Section 1.8 and 1.10 of the Commission's Rules of Practice and Procedure (18 CFR 1.8 and 1.10). All such petitions or protests should be filed within ten days of the issuance of this order. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of the Public Service filing are on file with the Commission and are available for public inspection.

By the Commission.

(SEAL)

LOIS D. CASHELL,
Acting Secretary.

APPENDIX F

Statutes

Section 2 of the Natural Gas Act of 1938, 15 U.S.C. § 717b, reads in relevant part as follows:

> SEC. 2. When used in this act, unless the context otherwise requires—
>
> (1) "Person" includes an individual or a corporation.
>
> (2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.
>
> (3) "Municipality" means a city, county, or other political subdivision or agency of a State.
>
> (4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.
>
> (5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.
>
> (6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
>
> (7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

Section 7(b) of the Natural Gas Act of 1938, 15 U.S.C. § 717f(b), reads as follows:

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

see

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